UMW INDUSTRIES [1985] SDN. BHD. (BY A POWER OF ATTORNEY)

v.

ATLAS INTEK (M) SDN. BHD. (IN RECEIVERSHIP)

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[SUIT NO. 24-335-86]
9 MARCH 1988

CIVIL PROCEDURE: *Setting aside regular judgment (in default) - Principles - Affidavit evidence prima facie defence - 48 hour notice under Legal Profession (Practice and Etiquette) Rules, 1978.*

The plaintiffs obtained judgment against the defendant in default of defence. The defendants applied by summons-in-chambers to set aside the said judgment. The application was disallowed and the defendants appealed. The defendants averred that judgment was taken without the requisite 48-hr notice under the Legal Profession (Practise and Etiquette) Rule 1978 being given and that there were triable issues.

The plaintiffs stated they had given the requisite 48-hr notice. The plaintiffs by way of an interim injunction had possession of the goods. They also claimed for balance of payments.

Held:
As there was no merits in the defence and no triable issues, the appeal is dismissed.

[**Editor's Note:** This matter has gone on appeal to the Supreme Court *vide* SC Civil Appeal No. 75 of 1988.]

For the plaintiffs - Seeralan; M/s. Mahadevi Ganeshmurugan & Co.
For the defendants - Ahmad Murad bin Abdul Aziz; M/s. Murad & Leong

JUDGMENT

Mustapha Hussian J:

The plaintiff sold two forklifts to the defendants under a conditional sales agreement and by letter dated 4 September 1985, the defendants undertook to pay the sum of RM47,000 in ten monthly payments. The defendants defaulted. The two forklifts are still registered in plaintiffs' names as owners.

Plaintiffs filed the claim (encl. 1) on 30 May 1986 for this sum of RM47,000 or alternatively restraining the defendants from parting with the two forklifts as the ownership was still with the plaintiffs. The defendants were in November 1985 in receivership. On the same day of filing of the Writ, the plaintiffs also applied by *ex-parte* summons (encl. 3) and was granted an injunction restraining the defendants from preventing the plaintiffs from entering upon the defendants' premises and taking possession of the two forklifts and retaining same pending disposal of the Suit (Order of interim injunction encl. 5).

The writ was served on the defendants on 2 June 1986.

On 14 June 1986 the defendants entered appearance (encl. 7)

On 17 July 1986 the plaintiffs obtained judgment in default of defence (encl. 9), as no defence was filed.

The defendants on 12 September 1986 applied by summons-in-chambers (encl. 10) to set aside the judgment in default of defence and also for leave to defend the suit. In the affidavit by one of the receivers, it was alleged that the plaintiffs' solicitors had obtained the judgment without giving the defendants' solicitors the 48 hours notice as laid down by the Legal Profession (Practice and Etiquette) Rules, 1978 or any other notice, and further there were triable issues that a full trial can only resolve. As to the 48 hours' notice, the plaintiffs by affidavit (encl. 12) said that the 48 hours notice was indeed sent to the defendants' solicitors.

The defendants' application to set aside the judgment in default of defence was dismissed by the SAR on 18 February 1987. Hence this appeal to the Judge in chambers by the defendants.

The judgment that was obtained in default of defence was for the sum of RM42,870 (See encl. 9). This is clearly a judgment obtained under O. 19 r. 2, as the other prayers especially that of the declaration of ownership were not obtained by the plaintiffs.

The principle governing the setting aside of a regular judgment in default of defence, and since it is indeed a regular judgment, is that there must be an affidavit on the merits to show a *prima facie* defence which a full trial can decide. What we have here is the registration books of the two forklifts which are still in the name of the plaintiffs. And most important is the letter by the defendants dated 4 September 1985 (Exhibit 'B' to the affidavit by the plaintiffs in encl. 12) which stated in unequivocal terms that if the defendants failed to pay the ten monthly instalments of the RM47,000 due, the defendants "will surrender the above equipment to your company". The "above equipment" refers to the two forklifts and "your company" is the plaintiffs company. Since the defendants have not made good this promise, it is quite clear that the defendants will have to surrender the two forklifts to the plaintiffs.

Strangely, the plaintiffs had entered judgment in default on the monetary claim. And the plaintiffs had by an earlier injunction taken the two forklifts into possession, and had done so until the final determination of all Court proceedings (see order of injunction Encl. 5).

In the defendants' application (see Encl. 10) there is no mention of any application for the plaintiffs returning the two forklifts back to the defendants. The Court was solely concerned with the monetary judgment. And since there was no merit in the defence and no triable issues, the appeal against the SAR's order was therefore dismissed.

It would seem here that the plaintiffs had not only obtained judgment for the balance of payments due to the two forklifts but had also taken into possession the said two forklifts. The Court is only concerned with the judgment and probably if the defendants had conceded to the judgment, there is nothing to prevent the defendants from applying for the return of the two forklifts.

Also found at [1988] 2 CLJ 122